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# FREEDOM FROM CAPTURE OF PRIVATE PROPERTY AT SEA.

BY CHARLES HENRY BUTLER.

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“SHALL we go forward or backward, or in what direction ?” So asked John Bright of the House of Commons in 1862, during a great debate in regard to the freedom of private commerce on the sea from capture during war.

In England the question has never been definitely answered; but in this country the answer has come in clear and undisguised tones from President McKinley in his last annual message to Congress, in which he said:

“The experiences of the last year bring forcibly home to us a sense of the burdens and waste of war. We desire, in common with most civilized nations, to reduce to the lowest possible point the damage sustained in time of war by peaceful trade and commerce. It is true we may suffer in such cases less than other communities, but all nations are damaged more or less by the state of uneasiness and apprehension into which an outbreak of hostilities throws the entire commercial world.

“It should be our object, therefore, to minimize so far as practicable this inevitable loss and disturbance. This purpose can probably be accomplished by an international agreement to regard all private property at sea as exempt from capture or destruction by the forces of belligerent powers. The United States government has for many years advocated this humane and beneficent principle, and is now in position to recommend it to other powers without the imputation of selfish motives. I therefore suggest for your consideration that the Executive be authorized to correspond with the governments of the principal maritime powers, with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerent powers.”

By these few words, so aptly and so forcibly spoken at the most opportune time, the policy of the United States has been pledged by the Administration, so far as it is possible for the Chief Executive to do so, and the reply to the question put by Mr. Bright thirty-six years ago is that the world not only must move, but

that it shall move in the right direction—forward, and not backward.

Mr. McKinley has exhibited on more than one occasion the faculty of expressing great principles, and the motives underlying them, in the fewest possible words, and these terse sentences have in no wise diminished his reputation in this respect. In analyzing them we find that the subject matter has been disposed of in all of its many aspects. "The experiences of the last year bring forcibly home to us a sense of the burdens and the waste of war." "We" are the victorious nation; how, therefore, could "we" have felt this burden and waste? Did he not mean that those burdens have been felt by our conquered enemies instead of ourselves? Not at all. He meant exactly what he said.

We felt them because, as our commerce is far greater than that of Spain, we had to bear the risk of capture and pay for it, notwithstanding the remote chance of loss, and notwithstanding, as the result proved, the inability of our enemy even to capture merchantmen. Notwithstanding the remoteness of the risk, however, one well-known shipping firm in New York City paid during the brief period of war over sixty thousand dollars in war premiums, and the aggregate amount of such premiums, according to shippers well informed as to the actual facts, far exceeded the value of all the Spanish merchantmen captured by our Navy under the general rules of maritime warfare.

But, it may be said, this was simply a payment by one class of our citizens to another class; what was one man's loss was another's gain; therefore no real or permanent loss resulted to the country at large. This argument, however, will not hold, for in this case nearly all risks were carried by foreign companies, and by far the largest part of the enormous aggregate amount was paid by American shippers, in American money, to foreign corporations, and therefore was a complete loss to our national wealth. Thus, even though victorious in the war, and strangely fortunate in not losing a single vessel, either merchant or naval, by capture or destruction, the burdens and waste of war were daily brought home to us in the most forcible manner.

The desires of this country in this respect are linked, as the message well expresses it, with those of other civilized nations, in order to reduce this damage to the lowest possible point; this can only be done by relieving commerce of the state of uneasiness and

apprehension into which an outbreak of hostilities necessarily throws the entire commercial world.

Why should the commercial world still be hampered by rules of warfare, as to maritime property, while the similar rules as to property on land became obsolete years ago, and were superseded by those more humane and sensible provisions which have been incorporated into the rules of war on land, of our own country, in fact, of almost every country which claims to rank among the really civilized nations of the world?

The only reason is that, up to this time, no nation has had the courage and tenacity not only to express the desire that the existing right should be modified, but also to insist upon such modification as a part of the law of nations, and not of particular conventions between individual states; and to effectively maintain that the time has at last come when civilization and humanity demand that a lawful (for it is lawful, even though barbarous) rule of war should be abrogated, although it may be apparently advantageous, from a naval and military point of view, to some of the nations which unselfishly offer to forego it, and which ask that all the other civilized nations of the world will join with them in an act that is bound to mark an epoch in the advance of civilization.

The statement that the desired object of minimizing, as far as possible, the inevitable loss and disturbance caused by war, can best be accomplished by an international agreement to regard all private property at sea as exempt from capture, is the practical, and, in fact, the only practicable, solution of the difficulty, and in a few concise words the President has not only diagnosed the trouble, but he has prescribed the remedy, and urged the immediate application thereof by the only power that can administer it, so far as this country is concerned—Congress.

Already resolutions have been introduced in both branches of the Legislature, authorizing correspondence on this subject by the Executive, through the regular and proper channels, with the representatives of foreign powers, and providing for the necessary expense of an International Congress. The only possible means of properly and speedily arriving at an agreement which will effect the desired reform is by formulating a universal treaty, which, when ratified by the various governments participating, will equally bind every one, so that any violation of the rule by a bel-

ligerent will be an offense, not against the other warring power only, but against all the nations uniting in the convention.

It is earnestly hoped that these resolutions will be speedily adopted, so that the proposed congress can be held at an early date this year, if possible.

The attitude of the United States, which has been thus expressed by the Executive, is in exact accord with its position as expressed during the Confederation, in the treaty concluded in 1785 with Prussia by Benjamin Franklin; during the administration of President Monroe, three-quarters of a century ago, through John Quincy Adams, then Secretary of State; by President Pierce and Secretary Marcy in 1854 and 1856; during Lincoln's administration by Secretary Seward in 1862. With such a clear record, there is every reason why this Government should now take the initiative in urging upon the world at large the adoption of a rule which it has always desired, but which, manifestly, it could not single-handed adopt or enforce.

We could not accede to the Declaration of Paris in 1856 because it abolished privateering at a period when we necessarily depended upon that form of naval protection for our very large merchant marine, and when our navy was abnormally small. President Pierce concisely and correctly formulated our position in this respect in his message of 1854, as follows:

"The proposal to surrender the right to employ privateers is professedly founded upon the principle that private property of unoffending non-combatants, though enemies, should be exempt from ravages of war. . . . Should the leading powers of Europe concur in proposing as a rule of international law to exempt private property upon the ocean from seizure by public armed cruisers as well as by privateers, the United States will readily meet them upon that broad ground."

In the recent war with Spain we necessarily enforced the rule of capture, as there was no response to our proclamation that we would not resort to privateering; and, as the implied retention of that right by Spain rendered our commerce subject to capture, we were bound to reserve and exercise every right of war as against our enemies.

Grave questions also exist as to the propriety of the Government's abolishing this class of captures, and the resulting increase of pay of naval officers and seamen by the prize money resulting therefrom, without some proper arrangement in that respect in advance of a declaration of war. It is to the credit of our Navy,

however, that there seems to be an almost unanimous willingness to abolish prize money, and to stand upon a pay table arranged on a proper scale, relative to that in the Army; and, unquestionably, so far as the element of prize money is concerned, no voice of opposition will be heard from our Navy against the abolition of the capture of unoffending merchantmen. Officers and men alike are on the outlook for something better to capture or destroy than unarmed trading vessels, incapable of defense against even gunboats of the smallest class.

Notwithstanding the acknowledged right of capture, however, the United States Government, as an act of graciousness, has offered to restore to their owners those merchant vessels which were taken in the harbor of Santiago by the Army, and in regard to which there was no claim for prize money, thus treating maritime property, belonging to the residents of that city, in the same manner as property on land.

To the average mind the proposition that private property on sea should be treated on the same basis as private property on land seems almost self-evident, and the failure to adopt the rule seems inexplicable. The reason, however, lies in the hitherto persistent refusal of England to accede to the much desired reform. In 1825, France, Russia and the United States were ready to enter into an agreement abrogating the right of capture, but England declined to consider it, and it was not deemed advisable to conclude any general or individual convention without the accession of that power.

From that time to this there has been constant division in England, among her greatest statesmen, as to the advisability of the rule; the weight of authority has been sometimes on one side and sometimes on the other; in fact, in some instances, the same men have appeared on both sides of the controversy. Professor Hall, in the earlier edition of his valuable treatise on International Law, expressed himself as doubtful of the expediency of reforming the rule, but he was apparently a zealous convert to it in 1875, as appears by his article in the October number of the "*Contemporary Review*" for that year. The most noticeable instance of a changing heart, however, was when Viscount Palmerston asserted before the Liverpool Board of Trade, in 1856, that the honor and glory of having secured the Declaration of Paris belonged to the Ministry of which he was a member, and pledged

himself to obtain, if possible, the exemption from capture of all non-offending private property. Six years later, however, in Parliament, during the debate on Mr. Horsfall's motion to so extend the rule, he declared that the policy of the exemption from capture would be suicidal. He gave no reason, except that he had changed his mind. Such an opportunity could not be lost by Mr. Disraeli, who, thereupon, although himself opposed to the proposed reform, made this announcement the subject of a characteristically sarcastic speech, in which he asked the "noble lord" if all of his plans of government, so enthusiastically delivered and received at public meetings, were to be stigmatized by himself as "suicidal policies" when made the subject of motions in Parliament. Doubtless, Lord Palmerston felt towards his Parliamentary antagonist exactly as Browning did when he dashed off his famous parody on the music hall song, "By Jingo," at Mr. Gladstone's breakfast:

"We don't want to fight,  
But 'by jingo' if we do,  
The man whose head I want to punch  
Is Beaconsfield the Jew."

Lord Palmerston stuck to his new views, however, throughout the entire debate, in which Mr. Bright took part and asked the pertinent question already quoted, and owing to his opposition the movement did not result in any parliamentary reform at that time. The subject was not revived in Parliament again until Sir John Lubbock brought it up in 1878, when, after a prolonged debate lasting three evenings, he finally consented to withdraw his motion without action.

To-day, however, sentiment is changing in England, and recently articles and pamphlets have appeared from authoritative sources, adopting the view announced by Professor Hall—that the greater the commerce of any nation, the greater its actual loss, and still greater its risks, and that the benefits of the rule of exemption are greater than those of the right of capture, when the longer periods of peace are contrasted with the shorter periods of war. This is most apparent in the case of wars between nations which have great merchant marines and those which have a smaller number of vessels to be exposed.

The proposition is a simple one. A great nation is bound to win eventually in a war against a smaller one. Meanwhile, how-

ever, the commerce destroyers of the smaller nation may capture or destroy many merchant vessels of the larger power, and will necessarily have far more opportunities to do so, on account of the great number of vessels scattered all over the world, while the more powerful nation will not be able to retaliate in the same manner, not from any weakness of its own, but on account of the fewness of its adversary's vessels.

Under existing rules, a great mercantile nation will also have to spread its navy around the whole world to protect its peaceful commerce, thus weakening it for coast defense, blockades and attacks upon the enemy's strongholds and navy. If private commerce were exempted, although the enemy's merchantmen could not be captured, the navy could concentrate its forces upon the other points of attack and defense much more effectually, and ultimately be of greater benefit than if it were partly employed in protecting its own citizens from individual losses, and hunting for spoils, with the hope of weakening the adversary's financial resources. The other European nations are generally in favor of the rule of exemption, with the possible, although by no means certain, exception of France, to whom, however, belongs the credit of having in 1823, during the then existing war with Spain, made the earliest recorded announcement, during war, that the right of capture of merchantmen would be waived (although the principle had been first adopted in theory by the United States and Prussia in 1785). Since then, however, her course has varied, and during the war of 1871 she refused to reciprocate the exemption offered by Germany as to private property, thus forcing the abrogation of the rule, as announced by Germany at the commencement of the war.

Germany is apparently in favor of reforming the rule, and local efforts are now being made to have the government take the matter up; but it is trusted that this country will have the credit at the present time of taking the lead in this step, not only as to the suggestions already made, but as to the complete consummation so earnestly desired.

Italy is already bound to accede, as the rule is part of her civil and military law, and has also been embodied in treaties with several powers, including the United States. Austria has within the last thirty-five years, at least twice, exempted private property, once in a war with Italy and once in a war with Germany.



Russia is to some extent committed to the rule, as it is a step toward that universal peace which the Czar has asked all of his fellow sovereigns to assist him in obtaining by reducing the armaments of Europe.

All of the South American states will doubtless be eager for the adoption of the rule, and will gladly enter the conference. Bolivia, although hardly a maritime power, has already, in a treaty with the United States, provided for the adoption of this rule.

The nations of the East, China and Japan, are in such positions, both as to their navies and their commerce, that the rule of exemption will have far greater advantages than the right of capture, and they will doubtless gladly favor any measure which will definitely establish the rule.

Under all the existing circumstances, therefore, this is the most opportune time for the assembling of an international convention to consider the subject, and it is eminently proper that it should be held in this country, and at the seat of our Government.

Congress should not hesitate either to clothe the Executive with authority to enter into correspondence with the governments of the principal maritime nations, as suggested by the President, or to appropriate the necessary funds to defray the expenses of the International Congress as soon as the invitations are accepted, and the preliminaries arranged. It is of the utmost importance that there should be no delay, for the subject might be taken up and carried out by some other government, as soon as the consummation appears inevitable, and we should then be deprived of the honor and credit to which we are rightfully entitled, as the first nation to suggest the reform after the matter had lain dormant for a quarter of a century.

CHARLES HENRY BUTLER.